Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PALADIN ENTERPRISES, INC.,
Petitioner,

v.

VIVIAN RICE, as guardian and next friend of TAMIELLE HORN, MARILYN FARMER, co-personal representative of the ESTATE OF MILDRED HORN, TIFFANI M. HORN, co-personal representative of the ESTATE OF MILDRED HORN, MICHAEL D. SAUNDERS, individually and next friend of COLIN D. SAUNDERS, a minor, and personal representative of the ESTATE OF JANICE Y. SAUNDERS,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the publication of a book to a mass, undifferentiated audience, for which it serves a variety of lawful purposes, is protected by the First Amendment when it assists a member of that audience in committing a crime, unless the publication is both directed to and likely to incite imminent lawless action.

2. Whether this Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), applies to expression that advocates or encourages violation of current law or only to "abstract advocacy," defined as "mere abstract teaching of the moral propriety or necessity" of unlawful conduct.

3. Whether the publication of lawfully acquired information, already in the public domain, to a mass, undifferentiated audience is protected by the First Amendment when the information assists a member of that audience in committing a crime.

4. Whether a book disseminated to a mass, undifferentiated audience, for which it serves a variety of lawful purposes, is protected by the First Amendment whether or not it was also published with a purpose to assist would-be criminals, unless the publication is both directed to and likely to incite imminent lawless action.

5. Whether the book at issue in this case, disseminated to a mass, undifferentiated audience for which it serves a variety of lawful purposes, is protected by the First Amendment from civil liability for "aiding and abetting" a criminal act.

LIST OF PARTIES PURSUANT TO RULE 29.6

All parties to this proceeding appear in the caption of the case. Petitioner has no parent companies and no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES PURSUANT TO RULE 29.6	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
1. The Crimes of James Perry and Lawrence Horn	2
2. The Books of Paladin	3
3. Other Publicly Available Information	7
4. The District Court Proceedings	9
5. The Decision Below	11
REASONS FOR GRANTING THE WRIT	13
I. THE DECISION BELOW CONFLICTS WITH *BRANDENBURG v. OHIO* AND ITS PROGENY	13
II. THE DECISION BELOW CONFLICTS WITH THOSE OF OTHER FEDERAL AND STATE APPELLATE COURTS	19
III. THE DECISION BELOW CONFLICTS WITH *THE FLORIDA STAR v. B.J.F.* AND *SMITH v. DAILY MAIL PUBLISHING CO.*	25
IV. THE DECISION BELOW DECIDES AN EXTRAORDINARILY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT AT THIS TIME	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Alleco, Inc. v. Harry & Jeanette Weinberg Foundation, 665 A.2d 1038 (Md. 1995) 9
American Booksellers Association v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) 17
American Communications Association v. Douds, 339 U.S. 382 (1950) 29
Anderson v. Liberty Lobby, Inc., 471 U.S. 1134 (1985) 30
Bond v. Floyd, 385 U.S. 116 (1966) 23
Brandenburg v. Ohio, 395 U.S. 444 (1969) ..... *passim*
Carey v. Population Services International, 431 U.S. 678 (1977) 15
Case v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939) 13
Cox Broadcasting Corp. v. Cohn, 415 U.S. 912 (1974) 30
DeFilippo v. NBC, Inc., 446 A.2d 1036 (R.I. 1982) .. 24
Dennis v. United States, 341 U.S. 494 (1951) 18
Denver Area Education Telecommunications Consortium v. FCC, 116 S. Ct. 2374 (1996) 23
Dombrowski v. Pfister, 380 U.S. 479 (1965) 29, 30
Eclipse Enterprises v. Gulotta, No. 97-7099, 1997 WL 806977 (2d Cir. Dec. 9, 1997) 20
Edwards v. South Carolina, 372 U.S. 229 (1963) .. 4
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 29
Gooding v. Wilson, 405 U.S. 518 (1972) 17
Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) 20, 21
Hess v. Indiana, 414 U.S. 105 (1973) 15, 17, 18
High Ol' Times, Inc. v. Busbee, 621 F.2d 141 (5th Cir. 1980), *aff'g*, 456 F. Supp. 1035 (N.D. Ga. 1978) 19, 20
Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) 4
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 28

TABLE OF AUTHORITIES—Continued

	Page
McCollum v. CBS Inc., 249 Cal. Rptr. 187 (Ct. App. 1988)	24
NAACP v. Button, 371 U.S. 415 (1963)	16
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)	*passim*
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	26
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	4
Noto v. United States, 367 U.S. 290 (1961)	12, 14, 16, 17
NOW, Inc. v. Scheidler, 897 F. Supp. 1047 (N.D. Ill. 1997)	23
Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977)	26
Olivia N. v. NBC, Inc., 178 Cal. Rptr. 888 (Ct. App. 1981)	24
People v. Rubin, 158 Cal. Rptr. 488 (Ct. App. 1979)	18
Perry v. State, 686 A.2d 274 (Md. 1996), *cert. denied*, 117 S. Ct. 1318 (1997)	2
Reno v. ACLU, 117 S. Ct. 2329 (1997)	29
Simon & Schuster, Inc. v. New York Crime Victims Board, 502 U.S. 105 (1991)	8, 14
Smith v. Linn, 587 A.2d 309 (Pa. 1991)	24
Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)	25, 26
Speiser v. Randall, 354 U.S. 513 (1958)	4
Texas v. Johnson, 491 U.S. 397 (1989)	14, 18
Thomas v. Collins, 323 U.S. 516 (1945)	16
The Florida Star v. B.J.F., 491 U.S. 524 (1989)	25, 26
United States v. Barnett, 667 F.2d 835 (9th Cir. 1982)	22
United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978)	23
United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983)	21, 22, 23
United States v. Damon, 676 F.2d 1060 (5th Cir. 1982)	22
United States v. Fleschner, 98 F.3d 155 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2484 (1997)	14

TABLE OF AUTHORITIES—Continued

Page

United States v. Freeman, 761 F.2d 549 (9th Cir. 1985) 21, 22, 23
United States v. Holecek, 739 F.2d 331 (8th Cir. 1984) 22
United States v. Kelley, 769 F.2d 215 (4th Cir. 1985) 14
United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) 23
United States v. Russell, 804 F.2d 571 (9th Cir. 1986) 22
United States v. Schulman, 817 F.2d 1355 (9th Cir. 1987) 22
United States v. Solomon, 825 F.2d 1292 (9th Cir. 1987) 22
Walt Disney Productions, Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981) 24
Whitney v. California, 274 U.S. 357 (1927) 16
Winters v. New York, 333 U.S. 507 (1948) 14
Yates v. United States, 354 U.S. 298 (1957) 18
Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) 24
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 18

STATUTES

26 U.S.C. § 7206 22
28 U.S.C. § 1332 9
50 U.S.C. § 462 23
Antiterrorism and Effective Death Penalty Act of 1996, Public Law No. 104-132, 110 Stat. 1214 (1996) 19
Ga. Code § 26-9912 19

MISCELLANEOUS

Availability of Bomb-Making Information on the Internet: Hearing Before the Subcomm. on Terrorism, Tech. & Gov't Information of the Senate Comm. on the Judiciary, 104th Cong. 17 (1995) 15

TABLE OF AUTHORITIES—Continued

Page

Franklyn S. Haiman, *"Speech Acts" and the First Amendment* (1993) 17
Harry Kalven, Jr., *A Worthy Tradition* (1988) 16
Staughton Lynd, Comment, Brandenburg v. Ohio: *A Speech Test for All Seasons?*, 43 U. Chi. L. Rev. 151 (1975) 17
U.S. Department of Justice, *Report on the Availability of Bombmaking Information* (April 1997) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner Paladin Enterprises, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 10, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 128 F.3d 233 and is included in the Appendix ("App.") hereto. The opinion of the district court is reported at 940 F. Supp. 836 and is also included in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 10, 1997. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was filed on November 24, 1997, and denied by Order dated December 12, 1997. This Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech, or of the press.

STATEMENT OF THE CASE

The Court of Appeals has held, for the first time in this nation's history, that a book, available to the public in bookstores and libraries across the country, enjoys no protection under the First Amendment from liability for damages caused by one of its readers. In this case, petitioner Paladin Enterprises, Inc. ("Paladin") did no more than publish 13,000 copies of a book to a mass, undifferentiated audience for which it concededly serves a

variety of unobjectionable purposes. Nevertheless, the Fourth Circuit has declared that the publisher may be held liable in tort for the criminal acts of one of those readers, who allegedly consulted information contained in the book as part of his pre-existing plan—concededly unknown to Paladin—to commit murder.

1. The Crimes of James Perry and Lawrence Horn

In 1991, Lawrence Horn, former husband of Mildred Horn and father of their son, Trevor, entered a conspiracy with career criminal and convicted felon James Perry for Perry to murder Horn's family. *See* J.A. 21 ¶ 11 & 41 ¶ 13; Dk. No. 18, Exs. 67-68.[1] On March 3, 1993, Perry killed Trevor and Mildred Horn, and Janice Saunders, Trevor's nurse. J.A. 61 ¶ 6. Police thereafter searched Perry's residence, where they discovered several criminology texts as well as Paladin's catalogue. Dk. No. 18, Ex. 59. Paladin cooperated with authorities and provided evidence that, in January 1992, *after* he began conspiring with Horn, J.A. 21 ¶ 12 & 41 ¶ 14, Perry had ordered two of its books, including *Hit Man: A Technical Manual for Independent Contractors* ("*Hit Man*").[2]

Evidence of these orders, introduced through a Paladin employee at Perry's trial, helped establish his premeditation. Dk. No. 18, Ex. 71. Perry has been sentenced to death and his conviction has been affirmed. *See Perry v. State*, 686 A.2d 274 (Md. 1996), *cert. denied*, 117 S. Ct. 1318 (1997). Horn has been sentenced to life in prison.

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[1] References to the Joint Appendix in the Court of Appeals are denoted herein as "J.A." References to exhibits filed in support of Paladin's motion for summary judgment in the district court are denoted by the appropriate docket ("Dk. No.") and exhibit number ("Ex.").

[2] The second title, *How to Make Disposable Silencers, Volume II: A Complete Illustrated Guide*, is referenced only in passing in Respondents' complaints, which focus—like both of the decisions below—entirely on *Hit Man*.

The complaints in this action allege that Perry employed many of the methods described in *Hit Man*. For purposes of its motion for summary judgment, Paladin conceded that whether Perry followed those instructions and whether they assisted him remain disputed issues of fact that must be resolved in Respondents' favor. J.A. 61 ¶¶ 6-7; App. 16a n.2. It is, however, undisputed that Perry's methods, to the extent they resemble those described in *Hit Man*, are routinely featured in other publications, some of which were also found in Perry' possession. *See* pp. 7-9 *infra*.

Beyond filling Perry's mail order, Paladin had no contact with him and had none at all with Lawrence Horn. J.A. 59 ¶ 3; App. 16a n.2. Paladin had no knowledge of Perry's conspiracy with Horn, that either of them planned to commit a crime, or that Perry intended to kill anyone. J.A. 61 ¶ 9; App. 16a n.2.

2. The Books of Paladin

Paladin is a book publisher. It publishes hundreds of volumes discussing self-defense, weapons and martial arts, and various ways of "beating the system." Dk. No. 18, Ex. 1. Several of Paladin's books, including *Hit Man*, have been recommended by law enforcement and mystery writers' organizations. *Id.*, Exs. 29, 31, 33-35; J.A. 90 ¶¶ 24-25 & 91 ¶¶ 27-28. Many of them are palpably ambiguous as to whether they are to be taken as fact, fiction, or fantasy. *See* J.A. 83-84 ¶ 16a. Paladin's books consistently express disdain for government and its restrictions on individual liberty, and trumpet the benefits of self-reliance. *See, e.g.*, Dk. No. 18, Ex. 1, at 5, 15, 17.

It is undisputed that Paladin sells its books—including *Hit Man*—to a mass, undifferentiated audience through conventional channels of distribution, including "bookstores and public libraries" throughout the nation, as well as to "law enforcement agency libraries, police association and union libraries," and to "wholesalers and distributors,

who sell to book stores, libraries, and similar retail or institutional buyers." J.A. 101-02 ¶¶ 2.a & 2.b.[3] Paladin's marketing strategy is designed and "intended" to maximize sales of its books to the public, including (1) authors who desire information for the purpose of writing books about crime and criminals; (2) law enforcement officers who seek information about methods of committing crime; (3) persons who enjoy reading accounts of crime and the means of committing them for purposes of entertainment; (4) persons who fantasize about committing crimes but do not thereafter do so; and (5) criminologists and others who study criminal methods. *Id.* 59 ¶ 4.a & 60 ¶ 5.a; App. 16a n.2. For purposes of its summary judgment motion, Paladin conceded that whether its marketing strategy reflected as well an "intent" to sell its books to criminals and would-be criminals remained a disputed issue of fact that must be resolved in Respondents' favor at this stage of the litigation. J.A. 58-62; App. 16a n.2.

For the same reason, Paladin also conceded below that, when it published *Hit Man*, it "knew" and "intended" that the book would be purchased by all of the foregoing categories of readers and used by them for a broad range of lawful and unlawful purposes. J.A. 59 ¶ 4.b & 60 ¶ 5.a

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[3] The Court of Appeals' assertion to the contrary, *see* App. 43a-44a, finds no support in the record and is, in fact, entirely inconsistent with it on this and several other material points. Indeed, much of the Fourth Circuit's rendition of the underlying facts ignores the parties' *stipulations* contained in a Joint Statement of Facts submitted to the district court. *See* p. 10 *infra*. In a case such as this, where "the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated,' " *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 n.50 (1982) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Speiser v. Randall*, 357 U.S. 513, 525 (1958)), this Court "must 'make an independent examination of the whole record' " to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression," 458 U.S. at 915 n.50 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)). *See also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567-68 (1995) (same).

& b; App. 16a n.2. Nevertheless, the record indicates that, since its initial publication in 1983, *Hit Man* has been sold to some 13,000 readers, and there is no evidence that anyone other than James Perry allegedly consulted it in committing a murder. During that same period, the book has remained easily accessible on the shelves of libraries and bookstores throughout the country, J.A. 101-02, including the Library of Congress (L.C. Call No. HV6515.F431983).

Hit Man purports to have been written by "Rex Feral," a translucent pseudonym that literally means "King of the Wild Animals." The Paladin catalogue states:

> Rex Feral kills for hire. Some consider him a criminal. Others think him a hero. In truth, he is a lethal weapon aimed at those he hunts. He is a last recourse in these times when laws are so twisted that justice goes unserved. He is a man who feels no twinge of guilt at doing his job. *He is a professional killer.*
>
> Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. *For academic study only.*

Dk. No. 18, Ex. 1, at 41. This reference represents the sum total of Paladin's efforts to "market" *Hit Man*.

Multiple copies of the book have been lodged with the Clerk and are available for this Court's inspection. On its face, the book resembles a comic book more than a "technical manual." Indeed, at Perry's trial, the prosecutor displayed *Hit Man* to the jury and said, "[s]ee the cover—almost comical," adding that it was "[a]mazing . . . that James Perry followed this book." *Id.*, Ex. 70, at 55.

Throughout its opinion, the Fourth Circuit declares that *Hit Man* is "devoid . . . of any political, social,

entertainment, or other legitimate discourse." App. 45a; *see also* App. 32a, 61a-62a, 71a. The Court of Appeals' "chapter-by-chapter synopsis" of the book, *see* App. 48a-59a, is, however, demonstrably truncated. Most significantly, it omits *any* reference to *Hit Man's* extensive "Prologue," which presents a stylized third-person account of a professional "hit" and serves as the literary vehicle through which the remainder of the book's "story" is told. The Prologue is indistinguishable from thousands of portrayals of the escapades of "hit men" found in popular culture. J.A. 228, at 1-8. The Court of Appeals also largely disregards the book's "Preface," which articulates "Rex Feral's" rationalization for contract murder:

> There are many, many instances when atrocities are committed that the law will not or cannot pursue. And other times when the law does its part but the American legal system is so poor that *real* justice is not served. In those cases, as in cases of personal revenge or retribution, a man must step outside the law and take matters into his own hands.

J.A. 228, at ix.

The book's remaining chapters describe a wide variety of methods purportedly used by hit men that are familiar to readers of pulp fiction, some of which are excerpted by the Court of Appeals. *See* pp. 7-9 *infra*. Several such descriptions are, moreover, decidedly unprofessional and plainly bizarre.[4] At one juncture, the author intones that "many a man has been caught because he thoughtlessly

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[4] Many of these "instructions," largely omitted from the opinion below, border on the absurd—*e.g.*, requiring an "employer" to complete an information sheet on a pre-printed form that contains the directions, "Print plainly. Answer all questions as completely as possible. Use additional sheets if necessary," J.A. 228, at 73-80; the suggestion that a viable means of death is ordering a blowfish from a pet store and applying the toxic contents of the fish's bladder to a toothpick to be left for the victim's use, *id.* at 61-62; and warnings of caution in using the victim's bathroom facilities because of the possibility of leaving a telltale mark from one's buttocks, *id.* at 104.

removed his gloves after making the kill to help himself to food or drink from the victim's refrigerator." J.A. 228, at 104. These aspects of *Hit Man*, not to mention its constant allusions to "toys that would make James Bond envious," *id.* at 34-35, provide the reader with plain signals that "Rex Feral's" status as "hit man" turned author is the stuff of fantasy. *See also id.* at 37 ("while disguising myself as a writer I chanced to interview a former law enforcement officer"); *id.* at 128. In the book's final paragraph, "Rex" confides, apparently with tongue firmly planted in cheek, that:

> [S]ome day, when you've done and seen it all, when there doesn't seem to be any challenge left or any new frontier left to conquer, you might just feel cocky enough to write a book about it.

Id. at 130.

3. Other Publicly Available Information

It is undisputed that the information concerning "how to" commit murder described in *Hit Man* is available as well from many other publicly available sources. The record before the district court included a broad array of popular non-fiction books, detective magazines, and motion pictures that contain detailed descriptions of actual murders and how they were committed. *See* J.A. 69-75 ¶¶ 12-14, 83-87 ¶ 16; Dk. No. 18, Exs. 14-23. Such popular works, available in bookstores, libraries, and at the local movie house and video store, include *Contract Killer* (Dk. No. 18, Ex. 18) (the story of hit man Donald Frankos, which provides technical details of successful contract murders); *Mafia Enforcer* (*id.*, Ex. 19) (same, with respect to hit man Cecil Kirby); *Perfect Crimes* (*id.*, Ex. 22) (twelve chapters, each a blueprint for a nearly flawless crime); *The Squad* (*id.*, Ex. 23) (purportedly a factual account of the methods employed by an illegal hit team within the FBI); and *Wiseguy* (the subject of the film *Goodfellas* and of this Court's decision

in *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991)).[5]

In addition, bookstores and public libraries offer extensive collections of forensic investigation manuals, which teach what police look for and, when armed with such knowledge, how to avoid detection. *See, e.g.*, Dk. No. 18, Exs. 20, 21 & J.A. 71 ¶ 12f. Indeed, three such volumes, *Criminal and Civil Investigations Handbook*, *Interpretation of Blood Stains*, and *Management of Gunshot Wounds*, were found in Perry's possession. Dk. No. 18, Ex. 59. There is also a broad market for works describing the technical details of how crimes, including murder, are committed, purportedly for the use of mystery writers. *See* J.A. 75 ¶ 14b-g & 90 ¶ 20; Dk. No. 18, Ex. 25. The United States Military publishes instructional manuals that describe assassination techniques for use against *civilians*, books that have been broadly republished for informational purposes. *See, e.g.*, Dk. No. 18, Exs. 17 & 24.[6]

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[5] The record also includes a series of volumes written by Dave Fisher, and published by Pocket Books, which purport to be "as told" by an active hit man, who uses the pseudonym "Joey." These widely available works serve as the vehicle through which "Joey" describes in detail his methods of committing 38 murders. *See* Dk. No. 18, Exs. 14-15.

[6] *See also Assassination: A Primer*, Harper's, Aug. 1997, at 22-24 (reprinting portions of declassified CIA training manual, including that the "most reliable methods are severing the spinal cord in the cervical region (with the point of a knife or a light blow with an ax or hatchet) and severing the jugular and carotid blood vessels on both sides of the windpipe"); *Bomb books concern gun groups*, Milwaukee J. Sentinel, June 4, 1995, 1995 WL 2985808, at A1 ("For $6.95, one can buy U.S. Army publications that show the correct way to build and use incendiary bombs."). Traditional news reports and commentary also contain detailed information concerning the methods of crime. *See, e.g.*, Dateline NBC, Nov. 26, 1996, 1996 WL 6704778 (providing explicit instruction concerning "how to" place explosive device on airliner); Peter Kornbluh, *The CIA's Foreign Policy*, N.Y. Times, May 31, 1997, at A19 (reprinting diagrams from CIA assassination manual).

And, of course, fiction by authors such as Robert Ludlum, Frederick Forsythe, and Tom Clancy detail techniques for committing what is or comes close to being the perfect crime. *See* J.A. 69-72 ¶ 12. This literary genre is successful because of verisimilitude achieved through technical detail, including *each* of the techniques described in *Hit Man* or employed by Perry. Thus, for example, the popular works *Hit on the House*, *id.*, Dk. No. 18, Ex. 10, and *Cause of Death*, J.A. 85 ¶ 16c, available in any bookstore or public library, recommend a 22-caliber weapon at short range, shooting the victim in the eye, and the need to stand a distance from the victim to avoid blood splatter. *See also* T. Clancy, *Without Remorse*, Dk. No. 18, Ex. 12, at 221, 249. The AR-7 rifle (*Hit Man*, J.A. 228, at 21) is featured in novels (Dk. No. 18, Ex. 10) and in movies (J.A. 99 ¶ 3nn). The same is true of, among many others, the following descriptions in *Hit Man*: firearm serial number removal; fingerprint removal and avoidance; and the technique of using three shots, short range, to the head. *See* J.A. 72-74 ¶ 13.[7]

4. The District Court Proceedings

Respondents instituted these civil actions in December 1995 asserting, *inter alia*, that Paladin should be held liable in tort for "aiding and abetting" Perry's crimes.[8] Respondents' complaints alleged that, by publishing *Hit Man*, Paladin had rendered substantial "assistance" to Perry and had done so with an "intent" to facilitate his criminal conduct as required by Maryland law. *See Alleco, Inc. v. Harry & Jeanette Weinberg Found.*, 665 A.2d 1038, 1049-50 (Md. 1995).

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[7] *See also* Jack Hitt, *Plotting the Perfect Murder: Five Great Mystery Writers Create the Perfect Crime*, Dk. No. 27, Ex. D; Major John L. Plaster, USAF, ret., *The Ultimate Sniper*, Dk. No. 18, Ex. 36.

[8] Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1332.

Shortly thereafter, the parties and the trial court agreed that, to forestall the considerable burden and expense that would inevitably attend potentially unnecessary discovery, Paladin would file an early summary judgment motion to determine "whether the First Amendment is a complete defense, as a matter of law, to the civil action set forth in the plaintiffs' Complaint." J.A. 58-59; App. 16a n.2. Accordingly, the parties executed a "Joint Statement of Facts," which contains "facts that the plaintiffs and/or defendants would be able to establish by affidavit or otherwise in the context of defendant's motion of summary judgment." *Id.* In addition, the "Joint Statement" expressly afforded all parties the opportunity to contest the materiality of the facts set forth in the Joint Statement and to put before the district court additional undisputed facts relevant to the constitutional issue raised by Petitioner's summary judgment motion. Thus, Paladin filed, along with its motion, four declarations accompanied by more than 70 exhibits. *See* Dk. No. 18. Respondents chose to rely exclusively on the Joint Statement.

By Order dated August 30, 1996, the district court granted Paladin's motion. *See* App. 106a-31a, 132a-33a.[9] The district court explained that the "First Amendment bars the imposition of civil liability on Paladin unless *Hit Man* falls within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment." App. 81a. Thus, the trial court rejected Respondents' contention that the First Amendment does not apply to "speech aiding and abetting murder," as defined by state law, App. 81a-89a, and concluded that "the only category of unprotected speech under which *Hit Man* could conceivably be placed is

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[9] On September 6, 1996, the district court modified its opinion, in the wake of Respondents' motion for reconsideration, both to acknowledge that Maryland has recognized a tort of "aiding and abetting" in some circumstances and to emphasize that that fact had no bearing on its resolution of the constitutional issue raised by Paladin's summary judgment motion. *See* App. 74a-99a.

incitement to imminent lawless activity as defined in *Brandenburg v. Ohio*, 395 U.S. 444 (1969)." App. 82a.

The district court then determined, as a matter of law, both that the *Brandenburg* test had not been satisfied and that Paladin's subjective intent was "irrelevant" to that determination. App. 94a-95a. The book's text, the court concluded, is not "directed at inciting" illegal conduct, App. 95a-96a, and the *context* in which it was published precludes a finding that it was *likely* to produce *imminent* illegal action:

> The deadly information is contained in books that presumably take time to read. The books are available to an unlimited number of people at different times. At worst the books amount to nothing more than advocacy of illegal action at some indefinite future time.

App. 96a.

5. The Decision Below

On November 10, 1997, the Court of Appeals reversed. App. 71a. It held that Paladin may be liable in tort because "speech . . . that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment . . . at least where, as here [1] the defendant has the specific purpose of assisting and encouraging the commission of such conduct *and* [2] the alleged assistance and encouragement takes a form other than *abstract advocacy*." App. 18a (bracketed numbers and emphasis added). According to the Fourth Circuit, a book published under such circumstances does not contain "speech" within the meaning of the First Amendment, but is rather a "speech act," which enjoys no constitutional protection. App. 22a-28a, 30a-31a.

Thus, central to the Court of Appeals' holding is its conclusion that *Hit Man* is not entitled even to *application* of the "incitement to imminent lawless action" standard articulated in *Brandenburg* because it does not

constitute "abstract advocacy." The Court of Appeals' dismissal of *Brandenburg* flows from its determination that this Court's "short, *per curiam* opinion" in that case "is, by any measure, elliptical," and that its articulation of substantive law therefore should not be taken literally. App. 64a. Instead, the court below determined that *Brandenburg*'s "approving quotation from" *Noto v. United States*, 367 U.S. 290, 297-98 (1961), should be read to "confirm" that the *Brandenburg* standard applies only to "abstract advocacy"—*i.e.*, " 'mere *abstract* teaching . . . *of the moral propriety or even moral necessity*' for resort to lawlessness." App. 64a-65a (quoting *Noto*).

In this case, the Court of Appeals concluded, *Brandenburg* is not relevant because *Hit Man*, in that court's estimation, contains "not so much as a hint of the theoretical advocacy of principles divorced from action that is the hallmark of protected speech." App. 71a.[10] And, despite the parties' express stipulation and uncontroverted record evidence to the contrary, see J.A. 101-02; note 3 *supra*, the Court of Appeals further purported to ascertain both that Paladin "does not sell books through retail outlets," but only to a "limited self-selected group of people interested in learning from and being trained by a self-described professional killer," App. 44a, and that "a jury could readily find" that the book's only "communicative 'value' is the indisputably illegitimate one of training persons how to murder." App. 32a.[11]

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[10] *But see* App. 39a (*Hit Man* "so effectively written that its protagonist seems actually to be present at the planning, commission and cover-up of the murders the book inspires").

[11] The Court of Appeals' conclusion in this regard ignores the parties' stipulation that *Hit Man* was not only "intended" by Paladin to be purchased by a variety of law-abiding readers, *see* App. 45a n.8 (misconstruing relevant stipulation), but also that Paladin "had knowledge" such persons were *in fact* among the 13,000 who have purchased the book. J.A. 60 ¶ 5(b); App. 16a n.2. Moreover, Paladin submitted unrebutted affidavits, which established through exhibits thereto that *Hit Man* has been recommended reading for, among others, law enforcement officers and novelists. *See* J.A. 90 ¶¶ 24-

Finally, the Court of Appeals suggested—albeit in a footnote—that Paladin's concession that its subjective intent remains an issue of fact creates a *material* dispute concerning whether the *Brandenburg* standard is satisfied in any event. *See* App. 64a n.11. According to the Fourth Circuit, even if *Brandenburg* were otherwise applicable, "Paladin's remarkable stipulation that it *knew* that its murder manual would be used by murderers . . . 'upon receipt' to assist them" and "that the publisher *intended* that the manual would be so used" could lead a jury to conclude that the book was "likely to incite imminent lawlessness." *Id.* (emphasis added).[12]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH *BRANDENBURG v. OHIO* AND ITS PROGENY

The Court of Appeals' analysis proceeds from the premise that this Court's decision in *Brandenburg v. Ohio* "is, by any measure, elliptical," "inartful," and therefore fails to provide meaningful guidance to lower courts. App. 64a. Thus, the Court of Appeals considered itself

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25 & 91 ¶¶ 27-28; Dk. No. 18, Exs. 33, 35. A stipulation by the parties is no longer a disputed fact and it is an error of law to characterize it as one party's "contention," App. 45a-46a, which a jury is free to ignore. *See, e.g., Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 113-14 (1939). Accordingly, the Fourth Circuit's conclusion that *Hit Man* is "pure and simple, a step-by-step murder manual," App. 62a, can survive neither an independent review of the book itself nor an objective assessment of the undisputed and stipulated facts of record. *See* note 3 *supra* & note 13 *infra*.

[12] Paladin filed a timely petition for rehearing and suggestion for rehearing *in banc*. Promptly thereafter, the Fourth Circuit ordered Respondents to respond to the petition and, *sua sponte*, requested that the Department of Justice submit its views as well. App. 134a-35a, 136a, 137a. By order dated December 12, 1997, however, before the Justice Department had an opportunity to respond to the court's request, the Fourth Circuit summarily denied the petition. App. 139a.

unencumbered by *Brandenburg*, or by subsequent decisions of this Court, in determining that the constitutional standard set forth in that case applies only to "abstract advocacy," defined as " 'mere *abstract* teaching . . . *of the moral propriety or even moral necessity*' for resort to lawlessness," but not to expression otherwise " 'advocating or teaching' " illegal conduct. App. 64a (emphasis in original) (quoting *Noto v. United States*, 367 U.S. at 297-98). In so holding, the Fourth Circuit relied on its own previous decisions, which had similarly suggested that the " 'cloak of the First Amendment envelops critical, but abstract discussions of existing laws, but lends no protection to speech which urges listeners to commit violations of current law.' " App. 25a (quoting *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985)).[13]

The Fourth Circuit's narrow construction of *Brandenburg* stands in stark contrast with the precise holding in that very case. In *Brandenburg*, this Court broadly held that states may "forbid or proscribe *advocacy of the use*

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[13] *See also United States v. Fleschner*, 98 F.3d 155, 158-59 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2484 (1997). As an independent review of *Hit Man* demonstrates, *see* note 3 *supra*, the Fourth Circuit's conclusion that the book is "devoid . . . of any political, social, entertainment or other legitimate discourse," App. 45a, and therefore does not constitute "abstract advocacy" as defined by the Court of Appeals, cannot withstand analysis. *See* pp. 6-7 *supra* (quoting book's Preface and Prologue). The book's expressed rationale for contract murder—born of frustration with the inefficiencies and inequities of the criminal justice system—is an "expression of dissatisfaction with the policies of this country [that constitutes] expression situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 410 (1989). It is, therefore, incorrect to say that "[i]deas simply are neither the focus nor the burden" of *Hit Man*. App. 62a. However unsavory the book's ideology may be to law-abiding citizens, it is political and social ideology nevertheless and its "advocacy" is "part and parcel of social or political discourse," App. 66a, no less than the race-baiting at issue in *Brandenburg*, or an admitted murderer's rendition of his own crimes in *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991). *See Winters v. New York*, 333 U.S. 507 (1948).

of force or of law violation" only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. at 447 (emphasis added). By its very terms, *Brandenburg* refers to "*advocacy* . . . of law *violation*" of any sort, not simply "abstract discussions of existing laws" or "vague, rhetorical threats of political or socially motivated violence." App. 25a, 61a, 66a (citation omitted). Indeed, it is difficult to envision a case in which "abstract" discussion could ever be either "directed to" or "likely to produce or incite imminent lawless action."

This Court has repeatedly applied the *Brandenburg* incitement test to expression that in no sense can be construed as abstract "discourse critical of government, its policies, and its leaders." App. 32a. In *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977) (quoting *Brandenburg*), for example, a case involving advertisements advising the public about contraceptives, this Court held that "whatever might be the case if the advertisements directly incited illicit sexual activity among the young, none of the advertisements in this record can even remotely be characterized as 'directed to inciting or producing imminent lawless action and . . . likely to produce such action.'" By the same token, the expression to which this Court has extended the protections of *Brandenburg* can hardly be considered the "'mere abstract teaching . . . of the moral propriety or even moral necessity' for resort to lawlessness." App. 64a. *See, e.g., Brandenburg v. Ohio*, 395 U.S. at 446 ("there might have to be some revengeance taken"); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) ("We'll take the . . . streets later."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 902 ("If we catch any of you going in any of them racist stores, we're gonna break your damn neck.").[14]

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[14] *See Availability of Bomb-Making Information on the Internet: Hearing Before the Subcomm. on Terrorism, Tech. & Gov't Information of the Senate Comm. on the Judiciary*, 104th Cong. 17 (1995)

The Court of Appeals' conclusion that *Brandenburg* should be all but dismissed as a cursory, *per curiam* decision is further belied by its well deserved reputation as a landmark ruling recasting—through its express rejection of the line of authority exemplified by *Whitney v. California*, 274 U.S. 357 (1927)—our First Amendment jurisprudence. By overruling *Whitney*, *Brandenburg* confirmed that the Constitution honors Justice Brandeis' enduring observation that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of law, not abridgment of the rights of free speech." 274 U.S. at 378 (Brandeis, J., concurring).

As this Court explained in *NAACP v. Button*, 371 U.S. 415, 429 (1963), "[a]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy." [15] The Court of Appeals' assertion to the contrary, *see, e.g.*, App. 32a, conflicts as well with the conclusion of most commentators that *Brandenburg* and its progeny necessarily limit the reach of cases such as *Noto v. United States*, 367 U.S. at 297-98, on which the Fourth Circuit relies. *See* 395 U.S. at 448-49 (quoting *Noto*) (emphasizing that even expression "advocating or teaching" the use of "violent action" remains protected unless it "incite[s] . . . imminent lawless action"); Harry Kalven,

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(statement of Robert S. Litt, Deputy Ass't Att'y Gen'l) ("[T]he legal principles are clear. The First Amendment protects speech—even speech that advocates or instructs illegal action—unless there is an imminent danger of, and an incitement to, lawless action, or unless the speech itself constitutes a crime. . . . [I]t is generally not possible to penalize speech unless the speech crosses the line from providing information or mere advocacy to inciting imminent lawlessness or participation by the speaker in illegality.")

[15] *See also NAACP v. Claiborne Hardware Co.*, 458 U.S. at 910 ("Speech does not lose its protected character" when it serves to "coerce" recipients "into action;" the First Amendment " 'extends to more than abstract discussion, unrelated to action.' ") (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

Jr., *A Worthy Tradition* 124, 216 (1988) (*Brandenburg* "extends [its] protection to all advocacy of violence, including advocacy of particular acts").[16]

Brandenburg reflects this Court's consistent admonition that "'[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within' narrowly limited classes of speech." *Hess v. Indiana*, 414 U.S. at 107 (quoting *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972)). By restricting the protection afforded by *Brandenburg* to "abstract advocacy," therefore, the Fourth Circuit has the law exactly backwards. As Judge Easterbrook has explained, in a decision affirmed by this Court, "[c]ases such as *Brandenburg v. Ohio* and *NAACP v. Claiborne Hardware* hold that a state may not penalize speech that does not cause immediate injury" because a "law awarding damages for assaults caused by speech also has the power to muzzle the press." *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). To be sure, "[m]uch speech is dangerous. Chemists whose work might help build a bomb . . . leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous than all the libel judgments in history." *Id.*

Finally, the Fourth Circuit's alternative conclusion—*i.e.*, that Paladin's stipulation concerning its state of mind creates a jury issue with respect to whether the *Brandenburg* standard is satisfied in any event, *see* App. 64a n.11—is also in marked conflict with that very case. The *Brandenburg* standard is an objective one, which requires

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[16] *Accord* Franklyn S. Haiman, *"Speech Acts" and the First Amendment* 22 (1993) (In *Noto*, this Court permitted punishment of "advocacy of illegal action whether that action was to be taken 'now or in the future' . . . . Not until 1969 [in *Brandenburg*] was the more speech-protective requirement that the potential danger be *immediate* added to the mix."); Staughton Lynd, Comment, Brandenburg v. Ohio: *A Speech Test for All Seasons?*, 43 U. Chi. L. Rev. 151, 159 (1975) (*Brandenburg* "implicitly repudiat[ed] the temporally-remote incitement notion" applied in *Noto*).

a threshold assessment both as to (1) the publisher's intent as reflected *in his words* and (2) the likelihood that those words will cause imminent lawless action. 395 U.S. at 447.[17] Before a defendant's state of mind ever becomes dispositive, the *Brandenburg* line of cases requires that the court first evaluate objectively whether the expression at issue, in the context in which it was published, is both "directed to" *and* "likely to incite or produce" imminent lawless action. 395 U.S. at 447.[18] In this case, therefore, the district court properly concluded that because *Hit Man* is, *inter alia*, published to a mass audience for which it serves a variety of lawful purposes, it cannot constitutionally be made the subject of civil liability. App. 95a-96a. *See, e.g., Hess v. Indiana*, 414 U.S. at 108-09.[19]

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[17] *See Texas v. Johnson*, 491 U.S. at 409 (*Brandenburg* requires "careful consideration of the actual circumstances surrounding" the expression at issue); *Hess v. Indiana*, 414 U.S. at 108-09 (incitation to imminent lawless action must be gleaned from "the import of the language"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 929 (court must focus on the defendants' "speeches themselves"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) (plurality opinion) ("line between permissible advocacy and impermissible incitation to crime" depends both "on the setting in which the speech occurs" and "exactly what the speaker had to say"); *People v. Rubin*, 158 Cal. Rptr. 488, 491 (Ct. App. 1979) ("we are not concerned with Rubin's specific intent. Rather, we must evaluate Rubin's words in the light of their attendant circumstances to determine" whether they can be penalized under *Brandenburg*).

[18] Put differently, absent a judicial determination that *Hit Man* satisfies the objective requirements set forth in *Brandenburg*, its publisher's "intent" is simply not a material fact relevant to a court's assessment of whether the First Amendment protects the book's dissemination as a matter of law. *Accord Dennis v. United States*, 341 U.S. 494, 583 (1951) (Douglas, J., dissenting) (constitutional protection must properly turn "on *what is said*," not "on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen") (emphasis added); *Yates v. United States*, 354 U.S. 298, 318-19 (1957). *See* pp. 27-29 *infra*.

[19] *Accord* App. 185a (U.S. Department of Justice, Report on the Availability of Bombmaking Information (April 1997) (hereinafter

II. THE DECISION BELOW CONFLICTS WITH THOSE OF OTHER FEDERAL AND STATE APPELLATE COURTS

Decisions in several other circuits—not even cited by the Court of Appeals—are also in direct conflict with its narrow construction of *Brandenburg*. The Fifth Circuit, for example, has twice held that books, magazines and other publications containing detailed, "how-to" instructions *must* be measured by the *Brandenburg* standard when the information they contain allegedly assists or otherwise causes a third party to act unlawfully. In *High Ol' Times, Inc. v. Busbee*, 621 F.2d 141, 142 (5th Cir. 1980) (*per curiam*), the Fifth Circuit declared unconstitutional a Georgia statute that criminalized distribution of "printed material" purporting to "describe" and "explain" the "method" by which illegal drugs could "be obtained or produced," 456 F. Supp. 1035, 1038 (N.D. Ga. 1978) (quoting Ga. Code § 26-9912). The State proffered two examples of "printed material" it asserted could constitutionally be sanctioned under the statute—an article in *High Times* magazine bearing the headline "Best Smuggling Vehicles," and "The Whole Drug Manufacturers Catalog." *Id. See* J.A. 119-22, 123-42. The court rejected this contention, holding that such publications constituted neither "a direct solicitation of unlawful activity" nor "incitement to imminent lawless action" within the meaning of *Brandenburg*:

> Reasonable minds could not differ, the requisite seriousness of the threat and imminence of action are

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"DOJR")) ("[I]t is doubtful that general publication of written material advocating illegality can ever be proscribed under the *Brandenburg* test."). The DOJR, prepared by the Department of Justice as required by Section 709(a) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1297 (1996), was formally submitted to Congress in April 1997, on the eve of oral argument in the Fourth Circuit in this case. Accordingly, the Court of Appeals ordered the parties to submit supplemental briefs, following oral argument, addressing the DOJR. The entire DOJR is reproduced at App. 141a-223a.

> not presented in *any* of the sample material entered into evidence. The defendant has not offered and the court has not found any instance when the written word, unassociated with any disruptive conduct, has met this grave test. The test of "inciting or producing imminent lawless action" in *Brandenburg v. Ohio* [ ] is simply not satisfied by the plaintiffs' sale or display of the books, magazines, and posters exemplified herein.

456 F. Supp. at 1039-40 (emphasis added).[20]

Similarly, in *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), *Hustler* magazine published an article entitled "Orgasm of Death," which contained detailed instructions on "how to" engage in autoerotic asphyxiation through hanging. *See id.* at 1018. A young man followed these instructions and died. Invoking *Brandenburg*, the Fifth Circuit reversed a jury verdict in favor of the deceased's family. The court expressly rejected the contention—embraced by the Fourth Circuit here—that "a less stringent standard than the *Brandenburg* test be applied in cases involving non-political speech that has actually produced harm." *Id.* at 1024. As the Fifth Circuit recognized:

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.

Id. at 1019. Indeed, the court—as it had in *Busbee*—questioned whether the *Brandenburg* standard can *ever*

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[20] *Accord Eclipse Enters. v. Gulotta*, No. 97-7099, 1997 WL 806997, at *4 (2d Cir. Dec. 9, 1997) (declaring unconstitutional law that criminalized sales to minors of trading cards describing heinous crimes by "declin[ing] any invitation to expand . . . [this Court's] narrow categories of [unprotected] speech to include depictions of violence" that do not constitute "direct incitement of lawless action").

strip expression disseminated to a mass audience of constitutional protection. *See id.* at 1022.

Other circuits, most notably the Ninth, have applied *Brandenburg* to speech containing instruction in how to commit crimes, in a context removed—in the same fashion as the Fourth Circuit characterized *Hit Man*—from "abstract advocacy." App. 31a-33a. In *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985), then-Judge Kennedy explained that, even when a properly instructed jury finds that a defendant "aided and abetted" violation of the tax laws, "[w]here there is some evidence . . . that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment" may properly be interposed. Thus, Justice Kennedy wrote, "[w]here the indictment is for counseling, the circumstances of the case determine whether the First Amendment is applicable, either as a matter of law or as a defense to be considered by the jury." *Id.* Indeed, even though Freeman had "encouraged" tax avoidance, had manifested a criminal purpose in doing so, and had "assisted" his audience in committing tax fraud, the Ninth Circuit held that the bulk of his conviction could not be squared with the First Amendment unless "the objective meaning of the words used are so close in time and purpose to a substantive evil" to satisfy *Brandenburg*. *Id.* at 552.

Similarly, in *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983), the Ninth Circuit reversed a conviction for aiding and abetting preparation of fraudulent tax returns because the expression on which it was based deserved protection under *Brandenburg*. The Ninth Circuit held that "*nothing should be clearer* at this stage in the development of first amendment jurisprudence" than that expression disseminated to a mass audience, which is said to "aid and abet" unlawful conduct, cannot be sanctioned *unless* it satisfies the "incitement to immi-

nent lawless action" standard. *Id.* at 1428 (emphasis added). Indeed, the court in *Dahlstrom* expressly predicated its holding on the assumption that "the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally." *Id.*[21]

These Ninth Circuit decisions conflict as well with the Fourth Circuit's uncabined rationale that the so-called "speech-act doctrine" requires the conclusion that "the provision of instructions that aid and abet another in the commission of a criminal offense is unprotected by the First Amendment." App. 22a-23a. In fact, as *Freeman*, *Dahlstrom*, and other decisions demonstrate, the *Brandenburg* "incitement" standard has been consistently applied to speech alleged to "aid and abet" crime where, as here, the expression at issue was disseminated to a mass, undifferentiated audience for whom it had informational

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[21] *Accord United States v. Russell*, 804 F.2d 571, 576 (9th Cir. 1986) (Ferguson, J., concurring) (in *Dahlstrom*, prosecution of defendants who "counseled" preparation of "false or fraudulent documents" violated First Amendment because government "failed to prove incitement of imminent unlawful action"); *United States v. Schulman*, 817 F.2d 1355, 1359 (9th Cir. 1987) (distinguishing *Dahlstrom* from cases in which defendant is an actual participant in fraudulent tax shelter program); *United States v. Solomon*, 825 F.2d 1292, 1297 (9th Cir. 1987) (finding defendants "did far more than merely advocate the creation of patent tax shelters . . . they actively performed all of the organizational and managerial tasks necessary to create and operate the tax shelters"); *see also United States v. Damon*, 676 F.2d 1060, 1062 (5th Cir. 1982) (incorporating into 26 U.S.C. § 7206(2), criminalizing the aiding or assisting in preparation of fraudulent tax return, a requirement limiting application of statute to "speech which incites imminent lawless activity") (quoting *Brandenburg*); *United States v. Holecek*, 739 F.2d 331, 335 (8th Cir. 1984) (*Brandenburg* applies where defendant only "advocate[s] through speech violation of the tax laws," but not where defendant participates in "the actual preparation of the returns").

The Fourth Circuit's reliance on *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982), is misplaced. *See* App. 22a-23a. The only First Amendment issue before the court in *Barnett* was the defendant's bald claim that, because his activities were limited to providing information, the Constitution absolutely prohibited his prosecu-

value unrelated to the commission of imminent unlawful acts. *Compare United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978) (applying *Brandenburg* to prosecution for aiding and abetting filing of fraudulent tax returns) *with United States v. Mendelsohn*, 896 F.2d at 1185 (*Brandenburg* inapplicable because there was no "evidence that the defendants' speech was informational in a manner removed from immediate connection to the commission of a specific criminal act" or that purchasers of computer program would use it "for anything other than illegal bookmaking").[22] The Fourth Circuit's contrary declaration, *i.e.*, that speech is *per se* unprotected by the First Amendment when it "aids and abets" and therefore becomes "an integral part of the crime," App. 21a, finds no support in these cases, which implicitly recognize that such pronouncements are not self-defining and are thus susceptible to becoming instruments for the kind of *ad hoc* balancing that characterizes the decision below.[23]

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tion. That the Ninth Circuit rejected this "specious syllogism" does not purport to speak to the relevant constitutional distinction articulated in *Freeman*, *Dahlstrom* and, more recently, in *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990), which properly affords the protection of *Brandenburg* upon a showing—which Barnett did not endeavor to make—that the speech at issue was "informational in a manner removed from immediate connection to the commission of a specific criminal act." *Id.* at 1185.

[22] *See also Bond v. Floyd*, 385 U.S. 116, 133-34 (1966) (expression encouraging draft resistance could not, "consistently with the First Amendment," form the basis of a criminal prosecution pursuant to statute punishing any person who " 'counsels, aids, or abets another to refuse or evade registration' ") (quoting 50 U.S.C. § 462(a)); *NOW, Inc. v. Scheidler*, 897 F. Supp. 1047, 1087-88 (N.D. Ill. 1997) (First Amendment protects instructional manual "outlining methods" for interfering with access to abortion clinics because "[e]ncouraging activity which was not immediately followed by violence is protected by the First Amendment").

[23] *See Denver Area Educ. Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2406 (1996) (Kennedy, J., concurring in part):

Brandenburg has also been consistently applied by other appellate courts to protect from civil liability a broad spectrum of works disseminated to a mass audience that allegedly caused third parties to commit, or otherwise assisted them in committing, violent or illegal acts.[24] None of these cases involved the kind of "abstract advocacy" to which the Fourth Circuit has purported to limit the reach of *Brandenburg* and none of them looked to the subjective intent of the defendant in determining the scope of First Amendment protection.

> [T]he creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence. Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day.

[24] *See, e.g., Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (wrongful death action by father of boy slain by person who had just seen the film *The Warriors*, which depicted scenes of gang violence, dismissed despite fact that perpetrator uttered a line from the film while committing the homicide); *McCollum v. CBS Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988) (Ozzy Ozbourne record that included song "Suicide Solution," which exhorted suicide, not actionable); *DeFilippo v. NBC, Inc.*, 446 A.2d 1036 (R.I. 1982) (parents could not maintain claim for death of son who hung himself imitating a stunt he had seen performed on *The Tonight Show*); *Olivia N. v. NBC, Inc.*, 178 Cal. Rptr. 888 (Ct. App. 1981) (young woman raped with bottle by teenage girls imitating similar incident depicted on television drama, *Born Innocent*, could not state valid cause of action); *Smith v. Linn*, 587 A.2d 309 (Pa. 1991) ("how-to" diet book did not "incite" reader who followed its instructions and died as a result); *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580, 583 (Ga. 1981) (broadcaster not liable for injuries caused to child who followed televised instructions concerning how to make sound effects because, "under First Amendment jurisprudence," no liability may attach unless broadcast "presented a clear and present danger that injury would in fact result").

III. THE DECISION BELOW CONFLICTS WITH *THE FLORIDA STAR v. B.J.F.* AND *SMITH v. DAILY MAIL PUBLISHING CO.*

All of the information contained in *Hit Man*, including the specific "instructions" that Perry allegedly followed, is widely available to the public from a variety of other sources including books, films, magazine articles, and news reports. *See* pp. 7-9 *supra*. There is, moreover, no allegation or evidence indicating that *any* of the information contained in the book was gathered by Paladin illegally. Accordingly, the Fourth Circuit's decision that Paladin may nevertheless be held liable in damages for disseminating such information to a mass audience is inconsistent with this Court's decisions in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).

In those cases, this Court strongly suggested that the First Amendment precludes the imposition of sanctions, including civil damages, "for the publication of true, lawfully-obtained information" to an undifferentiated mass audience where, as here, "the information is already in the public domain," at least where the expression at issue does not fall within a recognized category of unprotected speech such as "incitement to imminent lawless action." DOJR, App. 191a-92a. As the Justice Department has recognized, "[w]here similar or equivalent information is widely available elsewhere," this Court "has been unwilling to find that a restriction on publication of that information is 'narrowly tailored' to address a state interest" or that any " 'meaningful public interest' can be served by further restriction under such circumstances." App. 192a (quoting *The Florida Star v. B.J.F.*, 491 U.S. at 535).

This observation, ignored by the Court of Appeals, is certainly correct. In *The Florida Star* and *Daily Mail*, albeit in the context of governmental efforts to protect personal privacy, this Court concluded that, "once the truthful information [is] 'publicly revealed' or 'in the public domain,' " its further dissemination could not constitu-

tionally be the subject of civil liability. *The Florida Star v. B.J.F.*, 491 U.S. at 535 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. at 103). In the face of these decisions, as the Department of Justice has noted, "it is hard to imagine that the First Amendment would permit culpability or liability for publication" of works disseminated to a mass, undifferentiated audience, which contain information that has "a propensity to be misused by some unknown, unidentified segment of the readership, since sources of the same information inevitably will remain in the public domain, readily available to persons who wish" to misuse it. App. 193a.[25] In this case, however, the Court of Appeals has purported to do just that: impose civil liability on a publisher who has disseminated lawfully obtained information, widely available in the public domain, to a mass audience of undifferentiated readers whether or not it otherwise incites imminent lawless conduct.

IV. THE DECISION BELOW DECIDES AN EXTRAORDINARILY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT AT THIS TIME

The Court of Appeals' reformulation of *Brandenburg* will expose to civil liability a broad range of expression that has heretofore enjoyed constitutional protection. Moreover, as the DOJR's detailed examination of the district court's opinion in this very case illustrates, App. 181a-83a, 210a-12a, the Fourth Circuit's subsequent decision is similarly destined to influence ongoing congressional efforts to criminalize the dissemination of expression that may prove useful to criminals. Thus, if the decision below is not reversed, an imposing collection of

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[25] *See also Oklahoma Publ'g Co. v. District Ct.*, 430 U.S. 308, 311-12 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 595-96 (1976) (Brennan, J., concurring) (where information is "already in the public domain," this Court has "foreclosed any serious contention that further disclosure of such information can be suppressed before publication or even punished after publication").

books, magazines, films, and other expression will, for the first time, become the proper subject of criminal prosecution, civil liability, and legislative ban.

The Fourth Circuit's contrary assertion is based on its view that this case is "unique in the law" because "the contexts in which" virtually all other works describe or depict unlawful acts "will themselves negate a purpose on the part of the producer or publisher to assist others in their undertaking of the described or depicted conduct." App. 69a. As the Justice Department has acknowledged, however, a publisher's assertion of an innocent purpose "would only raise, rather than resolve, the critical question of fact regarding a publisher's intent; it would remain an issue for the trier of fact to determine whether one of the publisher's purposes was to facilitate criminal conduct." App. 209a-10a. With all due respect, therefore, the Court of Appeals is demonstrably incorrect when it suggests that a jury issue of "intent" will be raised "[i]n only the rarest case." App. 68a. As the fiction writers who have supported Paladin as *amici curiae* have emphasized:

> Paladin stipulated to facts known by all contemporary writers and publishers . . . . Information is used and abused by the disturbed, disaffected and dangerous elements of our society. . . . [P]ublishers and writers of mass-marketed works thus know that their texts may and will be used by criminal and would-be criminals to plan and execute crimes.

Brief *Amicus Curiae* of Horror Writers Ass'n, 4th Cir. No. 96-2612, at 3 (filed Jan. 15, 1997).

Under analogous circumstances, therefore, a jury can be expected to infer that the novels of Tom Clancy and Steven King, the films of Francis Ford Coppola and Alfred Hitchcock, and newspaper, television and magazine reports describing how the Oklahoma City and Pan Am 103 tragedies unfolded were all "purposefully" and "intentionally" disseminated to an audience that their pub-

lishers knew to a virtual certainty included persons who would misuse such information "upon receipt" for unlawful purposes. In such cases, a plaintiff's assertion of a defendant's culpable "intent"—coupled with evidence concerning a particularly heinous crime or sympathetic victim —will inevitably "allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988). *See* DOJR, App. 215a-17a.[26]

In advising Congress concerning the constitutionally permissible scope of legislation in this context, the Justice Department has frankly acknowledged, in a manner the decision below does not, that "[t]he government generally may not, except in rare circumstances, punish persons *either* for advocating lawless action *or* for disseminating truthful information—including information that would be dangerous if used—that such persons have obtained lawfully." App. 146a (emphasis added). Thus, although the Justice Department endeavors to identify narrowly circumscribed instances in which information useful to would-be criminals forfeits its First Amendment protection, the DOJR recognizes that the constitutionality of an "intent"-based standard is at best "uncertain," App. 215a-17a, and emphatically does not endorse the radical reformulation of this Court's decision in *Brandenburg*

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[26] This phenomenon, Paladin respectfully submits, mirrors what has unfolded in this case. In the context of an undeniably horrendous criminal act, the Court of Appeals has found it remarkably easy to declare *Hit Man* to be "a murder manual, pure and simple," App. 62a, a "finding" that ignores much of the book's contents, *see* pp. 5-7 *supra*, not to mention the parties' *stipulation* that *Hit Man* has in fact been disseminated to a mass, undifferentiated audience of 13,000 people who purchased it for a variety of lawful purposes. App. 16a n.2; J.A. 58-62. If a panel of appellate judges can cast aside stipulated facts in this manner, then a jury confronted with disputed facts and asked to assess a defendant's "purpose" will have a powerful incentive to punish expression, albeit with the best of intentions.

conceived by the Fourth Circuit. App. 146a. Nevertheless, the rule embraced by the Fourth Circuit now threatens to serve as an alternative blueprint for national legislation that places in jeopardy too much speech that law-abiding citizens are constitutionally entitled to receive.

Finally, the importance of the issues raised by this Petition is not diminished because proceedings in the district court have not yet run their course. Beyond the fact that the constitutional issues adjudicated by the Fourth Circuit implicate the right of all citizens to receive information,[27] the presentation of such issues for consideration by this Court is, if anything, sharpened by the manner in which they were brought before and resolved by the courts below. Specifically, the parties' Joint Statement of Facts, together with the additional undisputed facts placed in evidence by Paladin and the contents of the book itself, provide this Court with an unusually pristine record upon which to perform its independent review and base its constitutional judgment.

The parties' joint decision to contest these constitutional issues at the outset of the case was designed precisely to "avoid[] making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). That principle counsels as well that this Court review the decision below now and thereby prevent the "chilling effect upon the exercise of First Amendment rights" of speakers throughout the nation that will inevitably result "from the fact

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[27] *See Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997) (statute that prohibits speech because of harm it may cause to some in audience, *e.g.*, minors, unconstitutionally deprives others, *e.g.*, adults, of their right to receive same information); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *American Communications Ass'n v. Douds*, 339 U.S. 382, 395 (1950) ("Under the First Amendment, the public has a right to every man's views" and "[g]overnment may cut him off only when his views . . . threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself.").

of the [ongoing] prosecution" of this publisher. *Id.* *See Anderson v. Liberty Lobby, Inc.*, 471 U.S. 1134 (1985) (granting *certiorari* when court of appeals reversed summary judgment for defendant in libel action); *Cox Broadcasting Corp. v. Cohn*, 415 U.S. 912 (1974) (granting *certiorari* when state supreme court remands case for trial on cause of action prohibited by First Amendment).

CONCLUSION

For the foregoing reasons, Paladin respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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